No. 10937

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern District of California, and FRANCIS BIDDLE, Attorney General of the United States,

Appellees.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment of the District Court for the Northern District of California, Southern Division, denying the appellant's petition for a writ of habeas corpus.

This court has jurisdiction under provisions of 28 United States Code, Section 225(a).

Statement of Case.

Appellant is a conscientious objector. He believes he was denied due process of law by the Selective Service System and he therefore refused to report for induction. He was indicted, convicted, sentenced, and his appeal was affirmed in *Bagley v. United States,* 144 Fed. (2d) 788, wherein the court stated:

> ". . . Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error the writ of habeas corpus has of late years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the 'due process' question by resort to this remedial writ."

Appellant thereafter surrendered to the Marshal and filed a petition for a writ of habeas corpus in the District Court below. It was submitted with Points and Authorities and on October 3rd, 1944, the District Court filed a Memorandum and Order Dismissing the Petition. [R. 17.]

Question.

Did the District Court violate the implied mandate of this court in *Bagley v. United States* by ruling that a writ of habeas corpus was not available to the appellant?

Specification of Assigned Errors Relied Upon.

1. The District Court erred in dismissing petition for writ of habeas corpus.
2. The District Court erred in holding it could not consider the question of whether a petitioner for a writ of habeas corpus had been denied due process when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.
3. The District Court erred in holding that it could not consider whether or not a petitioner for a writ of habeas corpus had been deprived of a personal appearance before his local draft board, when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.
4. The District Court erred in holding it could not consider whether or not a petitioner for a writ of habeas corpus had been accorded an opportunity to present his claim to a certain classification before the Hearing officer; and the District Court erred in holding it could not consider whether or not he had been given an opportunity to meet adverse evidence nor whether or not the Hearing Officer misled him by advising him there was no adverse evidence against him, when petitioner had previously been convicted on a Selective Service charge and said conviction had been affirmed by the Circuit Court of Appeals.

ARGUMENT.

A Writ Will Issue Upon Allegation and Proof That a Selective Service Registrant Has Been Denied Due Process, the Registrant Thereafter Having Been Convicted and Being Presently Imprisoned; nor Is There Less Reason for the Issuance of the Writ Because the Registrant Had First Been Denied, in the District Court, the Opportunity to Present Such a Defense and Latterly in the Circuit Court of Appeals.

A.

A Denial of Due Process Exists When the Fundamental Rights of a Selective Service Registrant Have Been Abridged; and a Writ Will Issue.

This point is made merely as a preliminary to further discussion for, in its above stated bare form, it should need no argument. Although the scope of judicial review is not altogether settled in selective service cases as in administrative proceedings generally, it is submitted that the remedy of habeas corpus is available upon allegation and proof that a denial of due process exists. True, a petitioner's case may be complicated, indeed even defeated by his failure to make timely and consistent protest or by his failure to proceed further than the spot chosen by him to make his stand and thereafter seek judicial review. This will be commented on more fully hereafter under subsection "C."

See

United States v. Grieme, 128 F. (2d) 811 (C. C. A. 3, 1942);

In re Greenberg, 39 Fed. Supp. 13 (D. C., N. J., 1941).

The denial to petitioner of his rights in the Selective Service process consisted of three items [R. 4]:

First. The Local Draft Board classified petitioner without considering the written evidence actually submitted by him.

Second. The Local Draft Board did not accord the petitioner the right to a personal appearance in that the petitioner was not given an opportunity to present his case supporting his claim for a classification as a conscientious objector.

Third. The petitioner was not accorded an opportunity to present his claim before the Hearing Officer and was not given an opportunity to meet, nor was he advised, of any adverse evidence against him; that the Hearing Officer misled the petitioner by advising him that there was no evidence against him after which the Hearing Officer based his adverse ruling upon evidence which he had notwithstanding his statement to the petitioner.

B.

The District Court May Consider a Petition for a Writ of Habeas Corpus on Grounds That Attack the Basis of Detention, After Conviction, and a Writ Will Lie on Such Grounds.

The Supreme Court has spoken on this point in instances where the trial court's *jurisdiction* is questioned by the petitioner. In the case of *Johnson v. Zerbst,* 304 U. S. 468, 470, we find:

"The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas

> corpus is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.' "

Whether an allegation of denial of due process presents an equally or a sufficiently strong case may be open to argument but the dissenting opinion of Mr. Justice Holmes in *Frank v. Magnum,* 237 U. S. 309, 346, so arguing, has often been approved since its statement in 1915. It is not suggested that the facts of the case at bar are directly comparable with those of the aggravated *Frank* case that led Mr. Justice Holmes to remark: "Mob law does not become due process of law by securing the assent of a terrorized jury." (P. 347.) We do submit that the principle enunciated is applicable to the case at bar and that since 1915 the Congress and the Supreme Court have so liberalized habeas corpus that your petitioner is embraced in its protection.

In the case of *Walker v. Johnston,* 312 U. S. 284, 285, we find:

> "As we said in *Johnson v. Zerbst,* 304 U. S. 458, 466, 82 L. ed. 1461, 1467, 58 S. Ct. 1019, 'Congress has expanded the rights of a petitioner for habeas corpus. . . . There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus . . . it results that under the sections cited a prisoner in custody . . . may have a judicial inquiry into the very truth and substance of the causes of his detention. . . .' Such a judicial inquiry involves the reception of testimony, as the language of the statute shows."

The protective power of habeas corpus when urged by a petitioner after his conviction on a criminal charge has

been exercised in Selective Service situations and should be exercised in the instant case.

In *Ver Mehren v. Sirmeyer,* 36 F. (2d) 876 (C. C. A. 8, 1924), it was held that the petitioner was entitled to a discharge under courtmartial proceedings where it appeared that he had not been legally inducted and that the Selective Service Regulations under the Selective Service Act of 1917 had not been followed. See, also, *Ex parte Milligan,* 4 Wall. 2. In the *Ver Mehren* case, *supra,* the court thus went behind the courtmartial back to the Board, and having found that the Board had *improperly inducted* him, wiped out the courtmartial conviction entirely. In other words, after the petitioner had actually been convicted by courtmartial, the court proceeded to review, not his conviction, but the legality of the action of the Selective Service Board, in inducting him, in the first instance.

The principle involved in the *Ver Mehren* case, denial of due process, is not to be confused with the current "forcible induction" cases[1] through a similarity of origin that is more apparent than real. (The 1917 draft laws provided that a registrant was "inducted" when his local board ordered him to report. The 1940 draft law, as construed by the Supreme Court in *Billings v. Truesdell,* 321 U. S. 542, provides that a man is not inducted until he takes the oath or, as some later cases[2] have pointed out, affirmatively adopts or acquiesces in a military status for himself.)

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[1]*Ex parte Yost,* 55 Fed. Supp. 768; *In re Herman,* 56 Fed. Supp. 733.

[2]*Miller v. Commanding Officer,* 57 Fed. Supp. 884; *United States v. Graham,* 57 Fed. Supp. 941.

C.

Petitioner's Original Failure to Complete His Administrative Remedies Does Not Bar Him From the Benefits of a Writ of Habeas Corpus.

It is conceded that the import of the *Falbo* and *Billings*[3] cases is that exhaustion of administrative remedies, for a Selective Service registrant, required him to proceed at least one step further than the place the petitioner chose to test his grievances. It is submitted, however, that this defect in his case is cured by his current willingness to take the necessary additional step (as it is set forth in his petition) coupled with the law on the subject and particularly by this court's opinion in the case of *Bagley v. United States (supra)*.

In his petition for a writ of habeas corpus the petitioner says:

> "On or about the 17th day of July, 1943 (the date he was to report for induction), the petitioner mistook the law and his rights and duties thereunder with respect to reporting for induction and understood, was of the belief, and had been advised that upon reporting to his local draft board as directed so to do by the order of induction, he thereby voluntarily surrendered to and became a part of the Armed Forces of the United States. The petitioner, as a conscientious objector, was unable to thus surrender to the United States Army and become a part thereof.
>
> "The petitioner did not discover until on or about May 15, 1944, that by reason of a Supreme Court decision a registrant under the Selective Training

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[3]*Falbo v. United States,* 320 U. S. 549, 64 S. Ct. 346; *Billings v. Truesdell,* 321 U. S. 542, 64 S. Ct. 737.

and Service Act, ordered to report for induction, does not become a member of the Armed Forces until and unless he takes the oath administered to the inductees.

"The petitioner is willing at this time to comply with the order to report for induction heretofore issued by his local draft board, or any new order to report for induction which may be issued by his local draft board up to the point of actually becoming a member of the United States Army; and the petitioner is willing to take any other steps, up to said point of submission to said United States Army, so far as are now known to the petitioner, which he may be ordered to take, short of and other than such actual submission to said Army.

"The petitioner is willing to take such steps in order to exhaust all administrative steps and procedures in order to secure a judicial review of the action of the Selective Service Agencies which said action the petitioner has claimed, and believes, to be in violation of his rights to due process of law, and in violation, by said Selective Service Agencies, of both the constitutional rights of petitioner and the Selective Training and Service Act and the Regulations adopted pursuant thereto.

"Had the petitioner, on or about July 17, 1943, known or been advised that reporting as directed by his local draft board, without taking the oath, would have continued civil, as distinguished from military jurisdiction over the petitioner, and had the petitioner known or been advised that such a report on his part to the place directed in said order was necessary in order to secure a judicial review of the arbitrary action of the Selective Service Agencies, the petitioner would have so reported."

It is submitted that this court (having before it the above offer) indicated to petitioner his remedy when this court in its opinion[4] in the *Bagley* case stated (at p. 791):

> ". . . Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error the writ of habeas corpus has of late years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the 'due process' question by resort to this remedial writ."[5]

it undoubtedly had reference to the large and growing number of Supreme Court decisions broadening the scope of the writ of habeas corpus.

The court must have had reference to the *Johnson* case *(supra)* at page 465, in which the Supreme Court stated that:

> "The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since adoption of the Sixth Amendment."

Other recent Supreme Court cases are:

Holiday v. Johnson, 313 U. S. 342; here the court stated that (at p. 350):

> ". . . a petition for habeas corpus ought not to be scrutinized with technical nicety;"

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[4]Apparently ignored or misread by the District Court judge, A. F. St. Sure, below. [R. 17.]

[5]It is to be noted that appellant's petition faithfully followed this opinion.

and further (at p. 351):

> "We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of habeas corpus in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done."

Chief Justice Hughes in *Bowen v. Johnston,* 306 U. S. 19, 26, reminded the courts of the nation that:

> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

Further it must be remembered that:

> ". . . habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." (Justice Holmes, dissenting in *Frank v. Magnum* (*supra*).)

In even more recent decisions these same views are reaffirmed.

See

Pyle v. Kansas, 317 U. S. 213;

United States v. Adams, 320 U. S. 220.

Similarly, in *Smith v. O'Grady,* 312 U. S. 329, 332, Justice Black referred to the writ as the great "historic remedy." This was an echo of the views of the court in *Mooney v. Holohan,* 294 U. S. 103, 113, that the writ was the

> ". . . historic remedial process when it appears that one is deprived of his liberty without due process of the law in violation of the Constitution of the United States."

More particularly and specifically, however, in *Enge v. Clark,* 144 F. (2d) 638 (see footnote of opinion at p. 638), this court recognized the availability of the writ of habeas corpus because of the pendency of similar cases, and deemed the latter "an exceptional circumstance" referred to in *Jones v. Perkins,* 245 U. S. 390, and *Jones v. Hoy,* 227 U. S. 245.

It is to be noted that the court below, in the instant case, did not even follow the ruling of this court in the *Enge* case and did not issue the writ and hear the case on the merits, as did this court in *Enge v. Clark,* 144 F. (2d) 638. The District Court below summarily denied the petition without ordering a writ issued and without hearing the petitioner's claim for relief on its merits.

Conclusion.

The District Court erred in deciding that the conviction and the affirmance of the conviction precluded the petitioner from obtaining a writ of habeas corpus on the ground urged for issuance of the writ, denial of due process, which had been offered as a defense in criminal proceedings and denied in such proceedings.

A petitioner imprisoned by reason of a Selective Service violation is entitled to a writ of habeas corpus upon allegation and proof of violation of his fundamental rights in the Selective Service process.

Respectfully submitted,

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Attorneys for Appellant.